Supreme Court, U.S.
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No. 99-766

IN THE

SUPREME COURT OF THE UNITED STATES

CONSOLIDATED EDISON COMPANY OF NEW YORK, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF PETITIONERS ON REPLY

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BRIEF OF PETITIONERS IN REPLY

Petitioners respectfully submit this Brief of Petitioners in Reply pursuant to Supreme Court Rule 15.6.

The United States Department of Energy ("DOE") and its predecessors have failed for nearly 50 years to dispose of the nation's spent nuclear fuel as Congress has directed. To remedy this failure, Congress established through the Nuclear Waste Policy Act of 1982 ("NWPA") a national program for the disposal of spent fuel. That program included, but was not limited to, a requirement that DOE enter contracts to begin accepting spent nuclear fuel by January 31, 1998. The government's opposition would have this Court believe the D.C. Circuit decisions directing utilities to pursue contractual remedies for DOE's failure to meet the January 1998 deadline somehow precluded challenges to any other conduct of DOE under the statute. Utilities and citizens are already suffering the consequences of DOE's failure to meet the deadline in the statutory contract for accepting spent nuclear fuel and may pursue contractual relief for that failure. The independent obligations of DOE relating to the national program for disposal of spent nuclear fuel are not, however, addressed by contractual relief. The ability of utilities to enforce these independent obligations is an issue of national importance.

Petitioners also seek review of the D.C. Circuit's failure to determine the scope of the jurisdictional provision in the NWPA. Prior to Petitioners in this case, no utility or state regulator contended that § 119 of the NWPA, 42 U.S.C. § 10139, provided courts of appeals "original and exclusive" jurisdiction to hear all claims of DOE's failure to act under the NWPA, including breach of the statutory contract. The D.C. Circuit did not in this case, and has not in any other case, decided whether Petitioners' interpretation of the jurisdictional provision in the NWPA is correct. The D.C.

Circuit's failure to consider the scope of its own jurisdiction also is an issue of national importance.

I. THE D.C. CIRCUIT'S DECISION POSES ISSUES OF CONSIDERABLE NATIONAL IMPORTANCE

Petitioners assert that the D.C. Circuit's decision has the effect of immunizing from judicial scrutiny DOE's failures to perform statutory obligations under the NWPA that exist independent of the obligation to begin accepting spent fuel on January 31, 1998. The government admits that the failures to comply with the statute raised by Petitioners never have been litigated. (*See* Brief in Opp'n at 13.) The issue of whether Petitioners' independent statutory claims were precluded is, therefore, an issue of national importance. The D.C. Circuit's decision eliminates the ability of utilities to require DOE to comply with the Congressional mandate that DOE develop a comprehensive program to address spent nuclear fuel.

Absent review of this case there will be no check on DOE's ability to collect billions of dollars from utilities while failing to justify the use of those funds as required by 42 U.S.C. § 10222(a)(4). In addition, without review, there arguably is no mechanism to prevent the government from using funds paid by Petitioners into the Nuclear Waste Fund for other than radioactive waste disposal activities, *e.g.*, as general treasury funds.

Lack of review by this Court also would result in Petitioners having no forum to address Petitioners' claim that DOE failed to establish terms and conditions for the disposal of spent fuel as required by 42 U.S.C. § 10222(a)(6). This too is an issue of national importance. The safety and security of the citizens of the United States depends on

careful coordination between DOE and the nuclear utilities with regard to the handling of spent nuclear fuel. Without the required terms and conditions, utilities have no way of knowing how long and in what quantities ever-growing amounts of spent fuel must be stored. Only courts of appeals have been empowered to require DOE to comply with the statutory direction to establish terms and conditions.

Petitioners' claims and DOE's obligations to comply with separate statutory provisions contained in the Act are, contrary to the government's assertion, unrelated to whether the duty to dispose of spent fuel beginning January 31, 1998, is statutory or contractual. Petitioners, for example, did not seek damages in their Petition; they alleged that DOE is improperly using and will continue to use Nuclear Waste Fund moneys to pay costs DOE has incurred in the breach of its obligation to dispose of spent nuclear fuel. Whether the breach is a violation of contract or statute, the NWPA does not authorize use of the Fund to pay costs of delay. The NWPA closely circumscribes the use of the billions of dollars paid by Petitioners and other utilities into the Nuclear Waste Fund. 42 U.S.C. § 10222(d).

Moreover, Petitioners' allegations of overcollection of fees and misuse of the Fund were not limited to claims that DOE is misusing the Nuclear Waste Fund to pay costs DOE incurred in failing to begin accepting spent fuel on January 31, 1998. Petitioners have alleged that DOE has not conducted annual assessments of the adequacy of the Nuclear Waste Fund and instead has engaged in persistent overcollection of fees. Petitioners have alleged that DOE is misusing the fund in violation of § 42 U.S.C. § 10222(d). These allegations cannot be resolved by contractual remedies. The proper collection and use of billions of dollars collected from utilities and their ratepayers is an issue of national importance.

Similarly, Petitioners' allegation that DOE failed to establish terms and conditions for disposal of spent nuclear fuel is unrelated to the issue of whether DOE's failure to commence disposal beginning January 31, 1998, is a statutory or contractual obligation. The statute requires DOE to establish terms and conditions. 42 U.S.C. 10222(a)(6). DOE's bare assertion that entering contracts with utilities satisfied this NWPA requirement has never been addressed by any court. All of the previous litigation addressed only whether DOE's unconditional obligation to begin accepting spent fuel by January 31, 1998, was statutory or contractual and the remedies for DOE's failure to meet this obligation.

DOE's failure to meet the deadline for accepting spent nuclear fuel, whether that deadline was statutory or contractual, does not forever relieve DOE of its obligation to establish terms and conditions for disposal of spent nuclear fuel. *See* 42 U.S.C. § 10222(a)(6). Once the January 31, 1998 performance date under the original schedule had passed such that the schedule no longer could be performed, it became invalid, and DOE was statutorily required to set another. Any other result would allow DOE to avoid implementation of Congress's direction to establish a national program for disposal of spent nuclear fuel merely by paying breach damages.

Moreover, the obligation to establish terms and conditions goes far beyond schedule issues. DOE must establish criteria for packaging the spent nuclear fuel for ultimate acceptance, priorities for acceptance, and rates of acceptance so that utilities may responsibly maintain that fuel pending DOE's ultimate performance of its unconditional obligation, whether the original deadline for this performance date was statutory, contractual or both.

In sum, the government insists that Petitioners' claims depend on a finding that the failure to dispose of spent

nuclear fuel as Congress directed placed DOE in breach of a statutory obligation. Petitioners, however, assert only that DOE's failure to carry out wholly separate statutory duties, performance of which was required independent of DOE's obligations to begin accepting spent fuel, violated the NWPA. Had DOE established terms and conditions, adjusted statutory fees, and ceased improper use of Nuclear Waste Fund dollars as the NWPA required, none of the separate statutory violations alleged in the Petition would exist, even though DOE still would be in breach of the statutory contract.

The D.C. Circuit's failure to consider DOE's failure to implement the NWPA is of national importance and worthy of this Court's review. The D.C. Circuit may not wash its hands of the totality of its responsibility to interpret the law as it applies to DOE's implementation of the nuclear waste disposal program intended by Congress. Under the NWPA, the courts of appeals are the only courts with jurisdiction to judge whether DOE has complied with the statute as Congress intended. If DOE were permitted to avoid its obligation to implement Congress's nuclear waste disposal plan by virtue of its breach of duty to Petitioners to take the fuel by a specified date, the entire national scheme would be subsumed into private contractual relationships between DOE and the nuclear utilities that could be avoided in the breach. This is not the result Congress intended when it passed the NWPA and designated courts of appeals "special courts" to hear challenges to DOE's failure to implement the critical and contentious nuclear waste program.

II. THE D.C. CIRCUIT HAS NOT DETERMINED THE SCOPE OF THE JURISDICTIONAL GRANT IN THE NWPA

In addition to their Petition, Petitioners filed a motion for leave to file an original complaint, pursuant to the D.C. Circuit's "original and exclusive" jurisdiction under the NWPA. 42 U.S.C. § 10139. The motion asserted that the D.C. Circuit's original and exclusive jurisdiction extended to "any civil action" arising under the Act, including claims for breach of the contract required by that statute. *See* 42 U.S.C. § 10139. The D.C. Circuit's April 16, 1999 decision, without explanation, dismissed this motion as moot along with procedural motions pendant to the Petition.

The government's opposition does not indicate why the D.C. Circuit's failure to consider its own jurisdiction over the nation's nuclear waste disposal program is an issue of other than general importance worthy of this Court's consideration. Nor does the government's opposition attempt to explain why Petitioners' motion was dismissed as moot. Rather, the government's opposition argues only that the D.C. Circuit's dismissal of Petitioners' motion for leave to file was correct.

Whatever the reason (unarticulated by the court), the D.C. Circuit's dismissal of Petitioners' motion for leave to file, like the result in the litigation underlying *Steel Co. v. Citizen's for a Better Env't*, 523 U.S. 83 (1998), is an instance of the court's failure to address the scope of its own jurisdiction. This legal issue is an issue of critical importance. The program at issue is the nation's nuclear waste disposal program; DOE has a long history of failing to resolve the spent fuel problem; and Congress has designated courts of appeals the *only* courts with jurisdiction to hear challenges to the executive branch's failure to implement the

spent fuel program as required by the NWPA. Nonetheless, the D.C. Circuit failed to address, on the merits, Petitioners' claim that the NWPA, 42 U.S.C. § 10139, vests courts of appeals with original and exclusive jurisdiction to hear all challenges to DOE's failure to act under the statute, including claims for breach of the statutory contract. The D.C. Circuit should be required to make that determination.

III. CONCLUSION

Petitioners respectfully request that this Court grant certiorari and decide nuclear waste disposal issues of national importance to the health, safety and national security of all citizens in the United States.

Respectfully submitted,

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